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# In the Supreme Court of the United States

OCTOBER TERM, 1955

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No. —

THE UNITED STATES, PETITIONER

*v.*

THE OHIO POWER COMPANY

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims in the above-entitled case.

### OPINION BELOW

The opinion of the Court of Claims and the dissenting opinion of Chief Judge Jones (Appendix B, *infra*, pp. 19-22) are reported at 129 F. Supp. 215.

### JURISDICTION

The judgment of the Court of Claims was entered on March 30, 1955 (Appendix B, *infra*, pp. 36-37). On June 18, 1955, the Chief Justice extended

the time for filing a petition for certiorari to and including August 12, 1955 (Appendix B, *infra*, p. 37). The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

## QUESTIONS PRESENTED

1. Whether the War Production Board in issuing necessity certificates for accelerated amortization had authority to certify only part of the cost of a new facility.

2. Assuming the Board had no statutory authority to issue partial certifications, whether it was proper for the Court of Claims to allow the taxpayer to amortize the full cost of the facility, even though the certifying agency had refused to do so.

## STATUTES AND REGULATIONS INVOLVED

The statutory provisions involved are Sections 23(t) and 124 of the Internal Revenue Code of 1939, and the Regulations involved are Treasury Regulations 111, Section 29.124-6, all of which are set forth in Appendix A, *infra*, pp. 14-18.

## STATEMENT

The taxpayer is a public utility which manufactures and distributes electrical energy. During World War II, as a result of its inability to meet the increasing demands for electricity, it decided to build a new electric generating plant at Brilliant, Ohio, along with a transmission line from this plant to its substation at Canton. This entire construction was known as the "Tidd Project Emergency Facility" and its amortizable cost was

$11,246,256.54. (R. 2-3;[1] Appendix B, *infra*, pp. 19-20.)

Pursuant to Section 124 of the Internal Revenue Code of 1939, which allows the rapid amortization over a period of five years or less of an "emergency facility" which has been certified as necessary in the interest of national defense, the taxpayer applied for a certificate of necessity applicable to the Tidd project. On November 9, 1944, the War Production Board issued Necessity Certificate No. NC-2029, addressed to the Commissioner of Internal Revenue, and stating that the Tidd project facilities were "necessary in the interest of national defense, during the emergency period, up to 35 percent of the cost * * * thereof." (R. 3-4; Appendix B, *infra*, p. 20.) Subsequent inquiry by the taxpayer revealed that this 35 percent certificate was issued "in accordance with the War Production Board policy [applicable] where the facilities sought to be certified were of such a nature as to be presumably useful in post-war operations." (R. 5.) In such cases only the excess cost due to the war emergency (determined by the Board to be 35 percent in the normal case) was certified.

Accordingly, the Commissioner, acting under the statutory mandate permitting rapid amortization for facilities covered by a necessity certificate, allowed the taxpayer to take rapid amortiza-

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[1] "R." references are to the original record on file with this Court.

tion deductions only on the basis of 35 percent of the cost of the Tidd project, leaving the remaining 65 percent subject to the standard depreciation deduction. The taxpayer, on the other hand, contended that it was entitled to rapid amortization deductions on the basis of the full cost of the Tidd project since the statute did not authorize such partial certifications as the War Production Board had issued in this and other cases. (Appendix B, *infra*, p. 20.) Consequently, after filing a timely claim for refund, the taxpayer instituted the present suit in the Court of Claims. (R. 9, 10.) That court, relying completely on its decision in a similar case in 1952, *Wickes Corp.* v. *United States*, 108 F. Supp. 616,[2] gave judgment for the taxpayer in the sum of $5,885,388.22 plus interest. Chief Judge Jones dissented, as he had done in the earlier case. (Appendix B, *infra*, pp. 21-22.)

## REASONS FOR GRANTING THE WRIT

1. The crux of the decision below is that the War Production Board exceeded its statutory authority when it issued partial certifications of the kind here involved and that it was required to issue a certificate for 100 percent of the cost of the property. On that issue, the decision below is in direct conflict with *United States Graphite Co.* v. *Sawyer*, 176 F. 2d 868 (C.A. D.C.), affirming, *per curiam*, *United States Graphite Co.* v. *Harriman*, 71 F. Supp. 944, certiorari denied, 339 U.S. 904.

[2] For the Court's convenience this opinion is printed in Appendix B, *infra*, pp. 22-35.

In that case, the United States Graphite Company, which had also received a 35 percent certificate of the type here in issue, sought to compel the Administrator of the Civilian Production Administration—the then certifying officer—to issue a 100 percent certificate, giving as its reason the same ground alleged in the instant case below, to wit, that the certifying officer had no power under the statute to make partial certifications.[3] The District Court refused to issue the writ, stating that the certifying agency had issued the 35 percent certificate in accordance with its statutory discretion. The District Court decision was affirmed *per curiam* by the Court of Appeals for the District of Columbia, with Judge Miller filing a lengthy dissent on the ground that the statute did not give the certifying agency any authority to issue less-than-100 percent necessity certificates.

Subsequently, the Wickes Corporation, which had taken over the operation of the Graphite Company in the course of a corporate merger, raised the same issue again, but this time by way of a tax suit for refund in the Court of Claims. That court, while recognizing (p. 621) that "Substantially the same questions" had been involved in the *Graphite* case, reached the contrary conclusion, expressing its agreement with Judge Miller's dissent rather than with the majority of the Court of Appeals. "In the circumstances [of our disagree-

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[3] There was also another issue in that case which is not now directly relevant.

ment with the District Court and the Court of Appeals of the District of Columbia]", said the Court of Claims (p. 621), "we are, naturally, skeptical of the correctness of our conclusions." Chief Judge Jones dissented. It is the reasoning in this *Wickes* decision of the Court of Claims which was adopted as the basis of the decision below.

It is therefore evident that, while there is a procedural difference between the *Graphite* case on the one hand and the *Wickes* and instant cases on the other, in that the former was a mandamus action while the latter were suits for refund, the decisions are completely irreconcilable in principle. The majority in the *Wickes* case explicitly stated its agreement with Judge Miller's dissent in the *Graphite* case; and Chief Judge Jones, in his dissent in the *Wickes* case, relied completely on the District Court and Court of Appeals majority in the *Graphite* case. Moreover, if, as the Court of Claims concluded, the certifying agency had no power to issue a less-than-100 percent certificate, and the taxpayer were automatically entitled to amortize the full cost once a necessity certificate had issued, then of course it would follow that a writ of mandamus would lie to compel the purely ministerial action of changing the figure on the certificate from 35 percent to 100 percent. Yet the District Court and Court of Appeals for the District of Columbia expressly refused to issue such a writ since they concluded that the certifying agency had acted within its statu-

tory discretion in limiting the certificate to 35 percent.

2. In view of the conflict which existed after the Court of Claims' *Wickes* decision, the Government contemplated filing a petition for certiorari. However, the Internal Revenue Service concluded at that time that the decision did not appear to be one of general importance,[4] and it was consequently decided not to file a petition. Subsequently, as more cases began to appear at the administrative level, the Internal Revenue Service announced that it would not follow the *Wickes* decision since it had no statutory authority to vary the percentage certified to it by the duly designated certifying agency. Rev. Rul. 54-214, 1954-1 Cum. Bull. 298.

Following the decision below, in which a tax refund of more than $5,000,000 is involved, the Internal Revenue Service was requested to undertake a complete survey of the pending cases in order to determine whether the magnitude of the problem warranted its presentation to this Court. This survey has revealed that there are currently

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[4] The Internal Revenue Service informed the Department of Justice that it did not have any claims for refund pending at that time under the World War II statute, and the subsequent statutory provision applicable to years beginning with 1950 (Section 124A of the Internal Revenue Code of 1939, as added by Section 216(a) of the Revenue Act of 1950, c. 994, 64 Stat. 906) contains language (Section 124A(e)(1)) expressly designed to assure that that statute would not receive the construction which has been placed on the prior statute by the Court of Claims in this and the *Wickes* cases.

pending 39 cases involving this same problem, eight of them in the courts, and 31 of them at the administrative level. The total amount of revenue at stake in all cases is approximately $62,000,000, three cases besides the instant one involving amounts in excess of $5,000,000.[5] All in all, approximately 80 percent of the necessity certificates issued by the War Production Board were partial certificates of the type here in issue, and all of these would be invalidated under the decision below.[6] Although, as pointed out in footnote 4, *supra*, the present problem cannot arise under the statutory provisions enacted for years beginning with 1950, in the interest of removing the cloud from all these World War II certificates as well as in view of the large number of pending cases and the very substantial revenue involved, it is urged that this Court review the decision below.

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[5] Of course, some undeterminable portion of this sum would not have been paid in taxes apart from the decision below since the taxpayers holding these partial certificates would normally have been entitled to ordinary depreciation deductions on the uncertified portion of the construction or to a recovery of their investment in some other way. Generally, however, this would have occurred at lower tax rates.

[6] S. Rep. No. 440, Part 2, 80th Cong., 2d Sess., p. 11. For an elaboration of the Board's partial certification policy see the War Production Board memorandum "Criteria for Preparation of Recommendations for Necessity Certificates" of March 8, 1944, which is reproduced in *United States Graphite Co.* v. *Sawyer*, No. 532, October Term, 1949, Record, pp. 81-87. See also S. Rep. No. 440, Part 2, 80th Cong., 2d Sess., p. 11, where the Special Committee Investigating the National Defense Program scored the War and Navy Departments for their failure to use such partial certifications in cases where the plants in question had substantial post-war utility.

3. For purposes of this petition, it is not necessary to review in detail the economic conditions which gave rise to the War Production Board's partial certification policy. Suffice it to say that by summer 1943, the initial purpose of the rapid amortization law—to stimulate private industry's contributions to the defense effort—had been largely fulfilled, and it was therefore decided that a gradual brake on further expansion was desired.[7] Accordingly, the certifying agency began to issue less-than-100 percent necessity certificates, as well as to require that all further construction or expansion of facilities be approved in advance in order to qualify for the amortization privilege.[8]

When dealing with an administrative agency's power to decide a difficult and delicate question such as the extent to which a given facility is necessary in the interest of national defense, it would be natural, in the absence of some specific limitation in the statute, to assume that Congress intended to give the agency the widest discretion in the exercise of its function. In the present statute there not only is no such limitation; there is an express authorization of flexible administration. Thus Section 124(f) (Appendix A, *infra*, pp. 15-16) provides that in computing the adjusted basis of

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[7] See the testimony of Byron D. Woodside, Director of the Business Expansion Office of the Defense Production Administration. 3 House Hearings before Committee on Ways and Means, 82d Cong., 1st Sess., Revenue Revision of 1951, p. 2667.

[8] 8 Fed. Register 13824 (October 5, 1943).

an "emergency facility" for the purposes of determining the annual amortization deductions:

> (1) There shall be included *only so much of* the amount otherwise constituting such adjusted basis as is properly attributable to such construction, reconstruction, erection, installation, or acquisition after December 31, 1939, as either the Secretary of War or the Secretary of the Navy [later the WPB] has certified as necessary in the interest of national defense during the emergency period * * *. [Emphasis added.]

It was this statutory provision which was squarely relied upon by Judge Pine and by the Court of Appeals majority which affirmed him in the *Graphite* case, as well as by Chief Judge Jones dissenting below. Moreover, if there is any ambiguity in the wording of the statute, it is completely dispelled by Section 29.124-6 of the applicable Regulations (Appendix A, *infra*, pp. 16-18) which specifically envisions partial certifications of the type here issued. (See the example of a 50 percent certificate cited in the Regulations.)

The Court of Claims stated in the *Wickes* case (p. 619) that—

> the [War Production] Board's only function was to determine whether or not facilities answered the description of the statute, i.e., were they "necessary in the interest of national defense during the emergency period." Having so determined, any attempt by the Board

to reduce the benefits which Congress granted to the person whose facilities answered the description, was in violation of the statute.

(Appendix B, *infra*, p. 29.) But this statement seems to lose sight of the fact that such a necessity determination is not always susceptible of a "yes" or "no" answer. Particularly when the stimulative purpose of Section 124 is kept in mind, it is apparent that the question to be asked by the certifying agency is not so much "Is or is not this facility necessary in the interest of national defense," but rather "If the facility is necessary at all, *how necessary* is it in light of present economic conditions?" and "How much of the cost of the facility is properly allocable to the necessity of national defense?"[9]

In the *Graphite* and *Wickes* cases the taxpayer also cited some legislative history, referred to in Judge Miller's dissent in the *Graphite* case, which was claimed to show that Congress did not intend the certifying agency to have the discretion in question. It does not seem appropriate at this point to go fully into this subject. However, all that the legislative history shows is that Congress

[9] It must be recalled that in view of the high surtaxes prevailing at the time, a 100 percent amortization certificate meant that the Government was effectively subsidizing 80 to 90 percent of the cost of the facility.

The present case is illustrative. The decision of the Court of Claims adds approximately $7,300,000 to the amortizable basis of this property, and, for the taxable years involved, rapid amortization instead of ordinary depreciation deductions, results in a reduction in taxes of more than $5,000,000.

intended the process of amortizing the certified amount to be automatic, once a necessity certificate had been issued. But this legislative history is of no aid in answering the question here at issue —the agency's power to issue less-than-100 percent certificates. And unless it is held that the agency had no such power, then it is the certified amount of 35 percent, and not an imputed amount of 100 percent, which must be amortized. Certainly it cannot be presumed that Congress intentionally tied the certifying agency's hands so as to confine its discretion in this important determination to an "all or nothing" choice.

All this, of course, merely underscores the undesirability of reviewing, by way of collateral attack in a tax action, policy judgments of a wartime administrative agency, and the fact that Congress undoubtedly never intended that the Commissioner of Internal Revenue should be permitted or required to go behind the necessity certificate issued to him by the duly designated certifying agency. See *Arkansas-Oklahoma Gas Co.* v. *Commissioner,* 201 F. 2d 98, 103 (C.A. 8th); Rev. Rul. 54-214, *supra.*

4. But even if the Court of Claims properly concluded that the certifying agency had no power under the statute to issue less-than-100 percent certificates, it by no means follows that the court itself was authorized to enter judgment as if a 100 percent certificate had been issued in this case. There is nothing in this record to show that the War Production Board, had it been faced with

such a choice under the prevailing economic conditions, would have issued a 100 percent certificate to the taxpayer rather than none at all. In any event, Congress undoubtedly intended the Board and not the courts to weigh the relevant factors, and it was improper for the court below to "exercise an essentially administrative function." *F. P. C.* v. *Idaho Power Co.*, 344 U.S. 17, 21. "[T]he guiding principle, violated here, is that the function of the reviewing court ends when an error of law is laid bare." *Id.*, p. 20; see also *Phelps Dodge Corp.* v. *Labor Board*, 313 U.S. 177, 194.

## CONCLUSION

The Court of Claims has made an erroneously restrictive interpretation of Section 124 of the Internal Revenue Code of 1939, in conflict with that rendered by the Court of Appeals for the District of Columbia. The problem is an important one affecting a large number of currently pending cases and involving a very sizeable amount of revenue. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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*Solicitor General.*
H. BRIAN HOLLAND,
*Assistant Attorney General.*
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HILBERT P. ZARKY,
*Attorneys.*

AUGUST, 1955.

APPENDIX A

Internal Revenue Code of 1939:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(t) [as added by Sec. 301, Second Revenue Act of 1940, c. 757, 54 Stat. 974] *Amortization Deduction.*—The deduction for amortization provided in section 124.

(26 U.S.C. 1952 ed., Sec. 23.)

SEC. 124 [as added by Sec. 302, Second Revenue Act of 1940, *supra*]. AMORTIZATION DEDUCTION.

(a) [as amended by Sec. 155(a), Revenue Act of 1942, c. 619, 56 Stat. 798] *General Rule.*—Every person, at his election, shall be entitled to a deduction with respect to the amortization of the adjusted basis (for determining gain) of any emergency facility (as defined in subsection (e)), based on a period of sixty months. Such amortization deduction shall be an amount, with respect to each month of such period within the taxable year, equal to the adjusted basis of the facility at the end of such month divided by the number of months (including the month for which the deduction is computed) remaining in the

period. Such adjusted basis at the end of the month shall be computed without regard to the amortization deduction for such month. The amortization deduction above provided with respect to any month shall, except to the extent provided in subsection (g) of this section, be in lieu of the deduction with respect to such facility for such month provided by section 23(l), relating to exhaustion, wear and tear, and obsolescence. The sixty-month period shall begin as to any emergency facility, at the election of the taxpayer, with the month following the month in which the facility was completed or acquired, or with the succeeding taxable year.

* * * * *

(e) [as amended by Sec. 155(d) of the Revenue Act of 1942, *supra*] *Definitions.*—

(1) *Emergency Facility.*—As used in this section, the term "emergency facility" means any facility, land, building, machinery, or equipment, or part thereof, the construction, reconstruction, erection, installation, or acquisition of which was completed after December 31, 1939, and with respect to which a certificate under subsection (f) has been made. * * *

* * * * *

(f) [as amended by Sec. 155 (e), Revenue Act of 1942, *supra*] *Determination of Ad-*

*justed Basis of Emergency Facility.*—In determining, for the purposes of subsection (a) or subsection (h), the adjusted basis of an emergency facility—

(1) There shall be included only so much of the amount otherwise constituting such adjusted basis as is properly attributable to such construction, reconstruction, erection, installation, or acquisition after December 31, 1939, as either the Secretary of War or the Secretary of the Navy has certified as necessary in the interest of national defense during the emergency period, which certification shall be under such regulations as may be prescribed from time to time by the Secretary of War and the Secretary of the Navy, with the approval of the President.

* * * * *

(26 U.S.C. 1952 ed., Sec. 124.)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

SEC. 29.124-6 [as amended by T. D. 5432, 1945 Cum. Bull. 180]. *Adjusted basis of emergency facility.*—

(a) *In general.*—The adjusted basis of an emergency facility for purposes of computing the amortization deduction may differ from what would otherwise constitute the adjusted basis of such emergency facility, in that it shall

be the adjusted basis for determining gain (see section 113) and in that it may be only a portion of what would otherwise constitute the adjusted basis. It will be only a portion of such other adjusted basis if only a portion of the basis (unadjusted) is attributable to the certified construction, reconstruction, erection, installation, or acquisition after December 31, 1939. It is therefore necessary first to determine the unadjusted basis of the emergency facility from which the adjusted basis for amortization purposes is derived.

The unadjusted basis for amortization purposes, in cases where the entire construction, reconstruction, erection, installation, or acquisition takes place after December 31, 1939, and such construction, reconstruction, erection, installation, or acquisition is certified in its entirety by the certifying officer as necessary in the interest of national defense during the emergency period, is the same as the unadjusted basis otherwise determined.

In cases where the certifying officer certifies the entire construction, reconstruction, erection, installation, or acquisition after December 31, 1939, as necessary in the interest of national defense during the emergency period, but only a portion of the construction, reconstruction, erection, installation, or acquisition attributable to the facility takes place after December 31, 1939, the unadjusted basis for the purposes of amortization is so much of the

entire unadjusted basis as is attributable to that portion of the construction, reconstruction, erection, installation, or acquisition which took place after December 31, 1939. For example, the X Corporation begins the construction of a facility November 15, 1939, and such facility is completed on April 1, 1940, at a cost of $500,000, of which $300,000 is attributable to construction after December 31, 1939. The certificate of necessity covers the entire construction after December 31, 1939, and the unadjusted basis of the emergency facility for amortization purposes is therefore $300,000. For depreciation of the remaining portion of the cost ($200,000), see section 29.124-7.

If the certifying officer certifies only a portion of the construction, reconstruction, erection, installation, or acquisition after December 31, 1939, then the unadjusted basis for amortization purposes is limited to the amount attributable to such portion of the construction, reconstruction, erection, installation, or acquisition after December 31, 1939. Assuming the same facts as in the example in the preceding paragraph, except that the certificate is to the effect that only 50 percent of the construction after December 31, 1939, is necessary in the interest of national defense during the emergency period, the unadjusted basis for amortization purposes is 50 percent of $300,000, or $150,000.

* * * * *

APPENDIX B

IN THE UNITED STATES COURT OF CLAIMS

No. 218-54

(Decided March 1, 1955)

THE OHIO POWER COMPANY

*v.*

THE UNITED STATES

*Mr. J. Marvin Haynes* for the plaintiff. *Messrs. Miller, Haynes, Tyree and Sheppard* were on the brief.

*Mr. Homer R. Miller,* with whom was *Mr. Assistant Attorney General H. Brian Holland,* for defendant. *Mr. Andrew D. Sharpe* was on the brief.

ON PLAINTIFF'S AND DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT

MADDEN, *Judge,* delivered the opinion of the court:

The plaintiff sues to recover $5,885,388.22 which it claims it overpaid in income and excess profits taxes for the years 1943, 1944 and 1945.

The plaintiff is an Ohio corporation which as a public utility manufactures and sells electrical energy. During World War II the demand upon it for additional service made it necessary for it to expand its facilities. Pursuant to Section 124 of the Internal Revenue Code it filed with the Sec-

retary of War, who was then the proper certifying authority, an application for a Necessity Certificate with respect to the construction of a new plant, and a transmission line from the new plant to one of its substations 55 miles away. The plaintiff claimed a cost of $11,246,256.54 for purposes of amortization.

The authority to grant Necessity Certificates was, in December 1943, transferred to the Chairman of the War Production Board, and in October 1945, was again transferred to the Administrator of the Civilian Production Administration. In November 1944, a Necessity Certificate was issued, addressed to the Commissioner of Internal Revenue, and relating to the plaintiff's new construction. It certified that the facilities were necessary in the interest of national defense during the emergency period, up to 35 percent of the cost attributable to the construction thereof. Because of the 35 percent limitation in the Certificate, the Commissioner of Internal Revenue permitted the rapid amortization of only 35 percent of the plaintiff's costs of construction, instead of 100 percent of those costs which, the plaintiff claims, he should have permitted.

In the case of *Wickes Corporation* v. *United States,* 123 C. Cls. 741, we had the same problem. We discussed at length the history and the policy of the statute permitting rapid amortization. We concluded that the attempted 35 percent limitation inserted in the Necessity Certificate in that case

was invalid, as a contradiction of the statute. What we said in that case is applicable to this one.

Defendant's motion for summary judgment is denied and plaintiff's motion is granted.

The plaintiff is entitled to recover, with interest as provided by law. Entry of judgment is suspended to await the filing by the parties of a stipulation showing the amount due.

It is so ordered.

LARAMORE, *Judge;* WHITAKER, *Judge;* and LITTLETON, *Judge,* concur.

JONES, *Chief Judge,* dissenting:

I think the provisions of the Internal Revenue Code clearly authorized the executive officials to limit the amount of rapid amortization deduction.

Section 124 (f) (1) of the Code is as follows:

> (f) Determination of adjusted basis of emergency facility.
>
> In determining, for the purposes of subsection (a) or subsection (h), the adjusted basis of an emergency facility—
>
> (1) There shall be included only so much of the amount otherwise constituting such adjusted basis as is properly attributable to such construction, reconstruction, erection, installation, or acquisition after December 31, 1939, as either the Secretary of War or the Secretary of the Navy has certified as necessary in the interest of national defense during

the emergency period, which certification shall be under such regulations as may be prescribed from time to time by the Secretary of War and the Secretary of the Navy, with the approval of the President. [26 U.S.C. 124, 1952 Ed.]

Section 124 (f) (3) (C) of the Code provides specifically that no amortization deduction shall be allowed in respect of any emergency facility for any taxable year "unless a certificate in respect thereof under paragraph (1) shall have been made * * * ."

Since the statute clearly authorizes the limitation, and the certificate actually limits the amortization to the 35 percent and that amount has been allowed, I would dismiss the petition. *United States Graphite Co.* v. *Harriman*, 71 F. Supp. 944; *United States Graphite Co.* v. *Sawyer*, 176 F. 2d 868 (certiorari denied).

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IN THE UNITED STATES COURT OF CLAIMS

No. 50224

(Decided December 2, 1952)

THE WICKES CORPORATION

*v.*

THE UNITED STATES

*Mr. N. Barr Miller* for the plaintiff. *Messrs. Haynes & Miller, F. Eberhart Haynes* and *Oscar L. Tyree* were on the briefs.

*Mr. John W. Hussey,* with whom was *Mr. Assistant Attorney General Charles S. Lyon* for the defendant. *Mr. Andrew D. Sharpe* was on the briefs.

OPINION

MADDEN, *Judge,* delivered the opinion of the court:

The plaintiff seeks to recover from the Government excess profits taxes in the amount of $43,610.29 for the year 1944 and of $93,146.01 for the year 1945. The taxes were paid by The United States Graphite Company. That company was later merged into the plaintiff company, which succeeded to its rights to the claims herein asserted. The instant dispute depends upon the proper interpretation and application of the statutes permitting a corporation which built or expanded its plant or equipment in order to increase wartime production to amortize the cost of such plant or equipment over a short period of years, by deductions from its income for tax purposes.

Section 23 (t) of the Internal Revenue Code provided, during the years here in question, for the deduction from gross income of "the deduction for amortization provided in Section 124." Section 124 is, therefore, the key section in this case. That section, in subsection (a), said that a taxpayer at his election was entitled to a deduction on the basis of the amortization of any emergency facility during a period of sixty months. It referred to

paragraph (e) for the definition of an emergency facility. The first sentence of subsection (e) says:

> As used in this section, the term "Emergency facility" means any facility, land, building, machinery or equipment, or part thereof, the construction, reconstruction, erection, installation or acquisition of which was completed after December 31, 1939, and with the respect to which a certificate under subsection (f) has been made.

Subsection (f) said:

> In determining, for the purposes of subsection (a) or subsection (h) the adjusted basis of an emergency facility (1) There shall be included only so much of the amount otherwise constituting such adjusted basis [1] as is properly attributable to such construction, reconstruction, erection, installation or acquisition after December 31, 1939, as either the Secretary of War or the Secretary of the Navy has certified as necessary in the interest of national defense during the emergency period, which certification shall be under such regulations as may be prescribed from time to time by the Secretary of War and the Secretary of the Navy, with the approval of the President.

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[1] The parties are agreed that the "adjusted basis" of the property here in question was its cost.

For brevity, we refer to the plaintiff's predecessor, The United States Graphite Company, to whose rights the plaintiff has succeeded, as the plaintiff. It was, during the Second World War, engaged in the manufacture of graphitar, which was used by the armed services and the Maritime Commission in the construction of aircraft, ships and other equipment used in the prosecution of the war. In 1943 the Government's demand for graphitar exceeded the capacity of the plaintiff's plant and facilities. Procurement officials encouraged the plaintiff to enlarge its facilities, and the plaintiff, prior to June 27, 1943, made plans to do so. It was granted high priorities for the obtaining of the materials, supplies and equipment needed for the enlargement.

On June 27, 1943, the plaintiff, in order to obtain the benefits of the rapid amortization provided for in Section 124 of the Internal Revenue Code, applied to the Secretary of War for a "necessity certificate" covering its proposed new factory building. That certificate was granted on October 28, 1943, and is not here in question. When the building was under way, the plaintiff applied to the War Production Board for preference ratings or priorities to assist it in obtaining the machinery and equipment for the new plant. These applications were made from October 7 to December 10, 1943, and were promptly granted. The machinery and equipment were obtained by the plaintiff and installed in the factory on various dates between December 28, 1943, and December 15, 1944.

By Executive Orders issued in December 1943, and March 1944, the President transferred to the Chairman of the War Production Board the functions which had formerly been exercised by the Secretary of War and the Secretary of the Navy, with regard to the issuance of necessity certificates. On May 29, 1944, the plaintiff duly filed an application for such a certificate covering machinery and equipment having a total estimated cost of $255,002.79. To the application was appended a list of the items included. On July 17, 1944, the War Production Board advised the plaintiff by letter that it had been determined that the machinery and equipment listed in the plaintiff's application were eligible for tax amortization on a 35% basis, provided that the items were to be acquired after the date of the letter. The Board's letter said that a Certificate of Necessity would be issued, as of July 17, 1944, after the Board had received a schedule in affidavit form stating, with respect to each item, that it had not been acquired before July 17, 1944.

The requested affidavit was filed by the plaintiff on July 27, 1944. It showed, of course, that some of the facilities had been acquired before July 17, 1944, and that the others had been or would be acquired after that date. On or about July 31, 1944, but as of July 17, 1944, the Board issued to the plaintiff a necessity certificate stating that the facilities described in the attached Appendix A were "necessary in the interest of national defense during the emergency period, up to 35% of the

cost" thereof. The attached Appendix A was the list which the plaintiff had submitted with its affidavit. The items thereon shown to have been received before July 17, 1944, were, however, crossed over with Xs made by a red pencil. On April 2, 1946, the Civilian Production Administration, which had, apparently, succeeded to the functions of the War Production Board issued an amendment to the Necessity Certificate, which amendment listed in detail the actual cost of the facilities received before and after July 17, 1944. It showed that the cost of those received before that date was $77,195.99, and of those received after that date was $140,031.44. Those figures were correct, and the present controversy concerns only the application of the amortization law to those amounts.

At the request of the plaintiff for a statement of the reasons for its action, the Civilian Production Administration on August 12, 1946, wrote the plaintiff that it was the Administration's policy, in cases where the facilities to be acquired would be useful in post-war operations, to limit necessity certificates to 35% of the cost of the facilities. The plaintiff had, earlier, been orally advised that the 35% figure had been selected because that was the estimated excess of the cost of the facilities in wartime over what would have been their peacetime cost.

The taxing authorities, in imposing excess profits taxes upon the plaintiff, allowed it to deduct accelerated amortization upon only 35% of the cost of the facilities acquired after July 17, 1944, and no such amortization at all upon those acquired be-

fore that date. The plaintiff contends that it should have been allowed to deduct accelerated amortization upon the full cost of both kinds of facilities.

We consider first the facilities acquired after July 17, 1944. As to those, War Production Board certified that they were eligible for accelerated amortization for tax purposes under Section 124. The plaintiff says that the Board had no power to put the 35% limit on the amount of the cost of the facilities on which amortization should be computed. We agree with the plaintiff. When Congress took the drastic step of conferring the important tax advantage of rapid amortization upon those private enterprises which would invest their own money in expanding their facilities to increase wartime production, it knew that in some cases the enterprises would have, at the end of the war, facilities still useful but which had been paid for, to a considerable extent, by reductions in income and excess profits taxes. See Hearings before the Senate Committee on Finance on the Second Revenue Act of 1940, 76th Cong. 3d Sess. (1940) 124, 125. Yet Congress provided for their amortization over a period of five years. When the War Production Board attempted to limit to 35% the proportion of the cost which could be so amortized, it was, in effect saying that the actual cost could be amortized, during the first five years, only to the degree which would contemplate its total amortization in about fifteen years. That was a contradiction of the statute. The Board, as we have seen, decided upon the 35% figure because that was its estimate of the ex-

cess cost of acquiring the facilities in wartime. But there is no suggestion in the statute or its legislative history that such a consideration had any relevance. The purpose of the statute was to induce private enterprises to acquire facilities for which they would have had no need, except for the pressure of wartime production. According to the Board's reasoning, if price and wage controls had kept the wartime cost of the facilities down to the peacetime cost, no use whatever would have been made of Section 124. But an enterprise does not spend its money to acquire unneeded facilities, or those which will be needed for only a short time, just because it can acquire them at normal prices.

We think that the Board's only function was to determine whether or not facilities answered the description of the statute, i.e., were they "necessary in the interest of national defense during the emergency period." Having so determined, any attempt by the Board to reduce the benefits which Congress granted to the person whose facilities answered the description, was in violation of the statute. The Government suggests that if the Board could not have limited its certificate to 35% of the costs of the facilities, it would, perhaps, not have certified them at all. We have no reason to suppose that the Board, when applied to by the plaintiff for a factual statement as to whether the plaintiff's facilities were, or were not "necessary in the interest of national defense during the emergency period," would have said to itself, "If we make a true statement, it will cost the Government X dol-

lars in lost revenue. If it would cost the Government only Y dollars, we would tell the truth. But since it will cost X dollars, we will not tell the truth."

The Government points to the language of Section 124(f), hereinbefore quoted which says that there shall be included for rapid amortization purposes "only so much of the amount otherwise constituting such adjusted basis as is properly attributable to such construction * * * or acquisition after December 31, 1939, as either the Secretary of War or the Secretary of the Navy has certified as necessary, etc." The Government says that this language authorized the certifying authority to certify only a part of the cost of the facilities, in his discretion. We think that this is a misreading of the statute. Subsection (e) (1) of Section 124, in defining the term "emergency facility" gives a somewhat complicated formula for determining the time at which the facility must have been acquired in order to be eligible for accelerated amortization. Apparently December 31, 1939, was the date after which, in any event, the facility must have been acquired in order to be so eligible. But even if acquired after that date, application for a necessity certificate had to be made within six months after its acquisition. And if some of the facility was acquired more than six months before the date of application and the rest within six months, the latter amount would be eligible. Thus the words "only so much of, etc." are needed, and have a rational application without construing them as authorizing

the certifying authority to contradict the purpose of the statute.

As to the facilities acquired before July 17, 1944, the problem is somewhat different. It will be remembered that the plaintiff applied for its certificate of necessity on all of its facilities on May 29, 1944. The earliest date at which it had acquired any of the facilities was December 28, 1943, so that its application was within six months of the acquisition. On July 17, 1944, the Board wrote the plaintiff that it had made a determination that all the facilities were necessary in the interest of national defense, provided the date of their acquisition was subsequent to the date of the letter. The Board requested the information, in affidavit form, hereinbefore described, and, having received it, issued its certificate, attaching the entire list, but having crossed out the items which were acquired before July 17, 1944.

The Government points to Section 124 (f) (1) which says that one gets accelerated amortization upon facilities which either the Secretary of War or the Secretary of the Navy has certified as necessary in the interest of national defense. It says that as to the facilities acquired before July 17, 1944, no certificate was issued, and that's the end of it. No certificate, no amortization. Since the Board's letter of July 17 stated that all the facilities listed were necessary, and since the plaintiff's application for its certificate was filed within the six months statutory period, the question arises,

of course, why the Board refused to issue the certificate upon at least the 35% basis.

On March 22, 1944, the Board, with the approval of the President, issued the following regulation (8 Fed. Reg. 2492, March 4, 1944):

> Section 4. *Application must be filed and determination made before construction is begun or date of acquisition.* The construction, reconstruction, erection, installation, or acquisition of a facility will not be deemed necessary within the terms of these regulations unless a determination of necessity is made by the certifying authority prior to the beginning of the construction, reconstruction, erection, installation, or date of acquisition.

The plaintiff contends that the regulation is invalid. When Section 124 was originally enacted, in the Second Revenue Act of 1940, approved October 8, 1940, subsection (f) (3) provided that a certificate of necessity would be ineffective unless obtained before the facility was acquired. By Joint Resolution, approved January 31, 1941, subsection (f) (3) was amended to provide that certificates of necessity would be valid if applications for them were made within sixty days after the acquisition of the facility. Again, in October 1941, by House Joint Resolution 235, Public Law 285, 77th Cong., 1st Sess., Ch. 464, Congress again amended subsection (f) (3) and enlarged the period within which application for a certificate might be filed from sixty days to six months after the acquisition of the facility.

Congress having specifically and repeatedly dealt with the question of when applications might be filed, and having each time enlarged the period, we think that the regulation quoted above, which in effect discarded the amendments made by Congress and put into effect the requirements of the original statute, was invalid. We think, therefore, that the plaintiff having applied within six months for its certificate, it was the duty of the certifying officer to determine the fact as to whether the facilities were necessary in the interest of national defense, and to certify or refuse to certify accordingly. The Chairman of the Board did determine that the facilities were necessary, and issued the letter of July 17 so saying. He then refused to issue the formal certificate solely because of the regulation which we have said above was invalid. He having put his mind upon the question of fact, which we think was his only function under the statute, and having answered that question in favor of the plaintiff, it was his duty to issue the certificate, and we feel certain that he would have done so but for the invalid regulation. His refusal, therefore, amounted in law, though not in fact, to an arbitrary refusal to perform his statutory duty. We have no reason to suppose that the enormous tax benefits which Congress, wisely or not, sought to confer by the enactment of Section 24 were to be bestowed or withheld at the arbitrary will of the executive. Equity regards that as done which ought to have been done. We do not have here the problem of deciding, contrary to the de-

cision of the official in which the statute lodged the power of decision, that the facilities in question were necessary. He decided that they were. We merely append the proper legal consequences to his decision by disregarding the invalid regulation which prevented him from putting his factual decision in legal form. We conclude, therefore, that the facilities acquired by the plaintiff before July 17, 1944, were eligible for accelerated amortization, and that the plaintiff is entitled to that amortization.

Substantially the same questions involved in the instant case were presented to the United States District Court for the District of Columbia in *The United States Graphite Co.* v. *Secretary of Commerce,* 71 F. Supp. 944. That was a suit by the plaintiff's predecessor, the Graphite Company, to compel the issuing authority to issue the certificates of necessity which would have entitled that company to the tax deductions which the plaintiff claims here. The District Court, Judge Pine sitting, denied relief. The United States Court of Appeals affirmed, 176 F. 2d 868, upon the opinion of Judge Pine. Judge Wilbur K. Miller of the Court of Appeals dissented, in an opinion with which we agree. The Supreme Court denied certiorari. 339 U.S. 904. The Government does not claim that that litigation made the dispute a *res adjudicata.* In the circumstances we are, naturally, skeptical of the correctness of our conclusions.

The plaintiff is entitled to recover. Entry of judgment will be suspended to await the filing by

the parties of a stipulation showing the amount due the plaintiff, according to our findings and opinion.

It is so ordered.

HOWELL, *Judge;* WHITAKER, *Judge;* and LITTLETON, *Judge,* concur.

JONES, Chief Judge, dissenting in part.

I agree that plaintiff should recover but the amount should be limited to 35 percent of the cost of the facilities.

I think the provision of Section 124 (f) (1) of the Internal Revenue Code which is as follows:

> (1) There shall be included only so much of the amount otherwise constituting such adjusted basis as is properly attributable to such * * * acquisition after December 31, 1939, as either the Secretary of War or the Secretary of the Navy has certified as necessary in the interest of national defense during the emergency period, which certification shall be under such regulations as may be prescribed from time to time by the Secretary of War and the Secretary of the Navy, with the approval of the President. * * *

clearly authorized the executive officials to limit the amount of the amortization. *United States Graphite Co.* v. *Harriman,* 71 Fed Supp. 944. *United States Graphite Co.* v. *Sawyer,* 176 F. 2d 868 (*certiorari* denied).

[Finding of Fact Omitted]

IN THE UNITED STATES COURT OF CLAIMS

No. 218-54

THE OHIO POWER COMPANY

*v.*

THE UNITED STATES

ORDER

On March 1, 1955, the court rendered an opinion holding that plaintiff was entitled to recover but suspended the entry of judgment pending the filing of a stipulation by the parties showing the amount due plaintiff in accordance with the court's opinion.

On March 25, 1955, said stipulation was filed signed on behalf of the plaintiff by its attorney of record and on behalf of the defendant by Assistant Attorney General H. Brian Holland, in which it is stated that in accordance with the court's decision there is due plaintiff the amounts set out below, together with interest as provided by law.

NOW, THEREFORE, IT IS ORDERED this thirtieth day of March, 1955, that judgment be and hereby is entered for plaintiff in the following sums together with interest on each as provided by law:

1943—Two million, sixty-five thousand seven hundred sixty-seven dollars and twenty-five cents ($2,065,767.25) of excess profits.

1944—One million, two hundred fifty-one thousand six hundred eighty-seven dollars and sev-

enty-one cents ($1,251,687.71) of excess profits,

1945—Two million, five hundred sixty-seven thousand nine hundred thirty-three dollars and twenty-six cents ($2,567,933.26) of income taxes.

By the Court

MARVIN JONES,
*Chief Judge.*

[caption omitted]

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ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

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Upon Consideration of the application of counsel for petitioner,

It is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 12th, 1955.

EARL WARREN,
*Chief Justice of the United States.*

Dated this 18th day of June, 1955.

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